IN RE: PROCEEDINGS BEFORE THE HONORABLE JENNIFER M. GRANHOLM, GOVERNOR OF THE STATE OF MICHIGAN, PURSUANT TO MCL 168.327

Respectfully Submitted:

Sharon McPhail
On Behalf of the Mayor of the City of Detroit

MOTION TO DISMISS THE PETITION OF THE DETROIT CITY COUNCIL, TO THE HONORABLE JENNIFER M. GRANHOLM, TO REMOVE MAYOR KWAME M. KILPATRICK FROM THE OFFICE OF MAYOR OF THE CITY OF DETROIT, OR IN THE ALTERNATIVE TO STAY THE PROCEEDINGS BEFORE THE GOVERNOR, PENDING RESOLUTION OF THE CHARGES BROUGHT BY THE WAYNE COUNTY PROSECUTOR

Now comes the Respondent, Kwame M. Kilpatrick, by his counsel, Sharon McPhail, and requests that the Honorable Governor, Jennifer M. Granholm, dismiss the petition of the Detroit City Council to remove him from the office of Mayor of the City of Detroit, or in the alternative, that the Governor issue a stay of these proceedings pending resolution of the charges brought by The Wayne County Prosecutor, for the following reasons:

1) **The statute, MCL 168.327, as codified pursuant to the Michigan Constitution of 1963, Article 7, Sec. 33, allowing the Governor to remove from office a local elected official does not include a situation in which the elected official merely has been charged with a crime but allows removal only where the Governor is satisfied from sufficient evidence submitted to the governor that the officer has been guilty of official misconduct, misfeasance or malfeasance, corrupt conduct in office, willful and/or gross neglect of duty, extortion or habitual drunkenness or has been convicted of being drunk or "where it appears by a certified copy of the judgment of a court of record of this state that a city officer ....has been convicted of a felony" Mayor Kwame M. Kilpatrick, for several reasons referenced in the attached Memorandum In Support of this Motion, is not subject to removal pursuant to the statute.**

2) **The Affidavit of City Council President Kenneth Cockrel is insufficient as a matter of law to support the Detroit City Council's Petition for Removal of the Mayor of the City of Detroit. (See Detroit City Council Rules and Procedures for Hearings and Related Proceedings , for Forfeiture of Elective or Appointed City Officers, Chapter 3, Section 2 incorporating by reference the Michigan Court Rules)**

3) **Although the Governor may remove a local elected official upon the request and affidavit of one person, to do so would be to create the wrong public policy; and would result in a virtual avalanche of politically based requests to the Governor for removal of local elected officials. In that the pending request for removal was made, in violation of the Council's own rules, by only a simple majority of the Detroit City Council, the petition is not properly before the Governor and it should be dismissed without further proceedings.**

4) **The Governor's removal proceeding, in that it is based upon allegations identical to those alleged in the criminal charges brought by the Wayne County Prosecutor, will require the Mayor to submit evidence which may be testimonial in nature: To do so would undermine his defense and violate his his constitutional right against self-incrimination.**

5) **The Detroit City Charter does not provide for removal of an elected official for the reasons upon which City Council bases its request for removal.**

6) **The rules or regulations establishing conduct, the violation of which would subject an elected official to removal, were required to be promulgated in advance of the conduct, by ordinance: Failure to do so is fatal to any removal effort. Application of said rules and regulations ex-post-facto the conduct would violate constitutional principles of due process.**

7) **The Detroit City Council investigation of the underlying facts that form the basis of their request to the Governor to remove the Mayor from office was flawed, and may not be used as "evidence" in the removal proceedings.**

Special Counsel to the City Council and several of the Council members pre-determined the results of his investigative hearings before holding them, thus tainting the process and making it inherently unreliable.

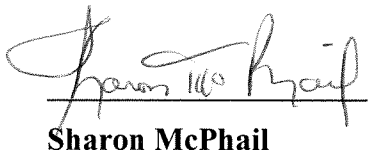
8) **The Stored Communications Act, 18 USCA Sec. 2701 et seq, prohibits the disclosure of the contents of the "text" messages: Absent the illegally obtained content, the introduction of which should be barred by constitutional principles, insufficient proof exists to meet the burden of proof beyond a reasonable doubt as is required for a finding of guilt.**
9) **The perjury statute, MCL 750.423 is void for vagueness in that the statute gives no notice that an immaterial or irrelevant misstatement of fact constitutes a violation of the perjury statute, a felony.**

Finally, the acts of local media and, more recently, the Office of the Wayne County Prosecutor have made it virtually impossible to seat an unbiased jury in this case. From the inception of Kwame M. Kilpatrick's term of office, certain members of the local print and broadcast media have led an overt challenge to his leadership. With initial allegations of wild parties held at the Manoogian Mansion, despite an Attorney General's investigation clearing the Mayor of those accusations, the Detroit print and broadcast media offered a daily meal of innuendo and direct charges of illegal and unethical conduct without the slightest proof. The Attorney General characterized the "party" allegations as "urban legend".

Beginning several years ago, after the tragic death of Tamara Greene, who was alleged to have been a "stripper" at the "party", the print and broadcast media published stories which either directly accused the Mayor of being involved in Greene's murder or paired negative stories about him with "unsolved crime" stories about the murder, in close proximity to each other. This has been a thinly-veiled effort to convince the voters of the City of Detroit that the Mayor is a "criminal".

For all of the reasons specified herein, and those referenced in the attached Memorandum In Support, the Mayor of the City of Detroit respectfully requests that the Honorable Jennifer M. Granholm dismiss the petition of five members of the Detroit City Council or, in the alternative, issue a stay of these proceedings pending the outcome of the charges brought by the Wayne County Prosecutor.

Respectfully Submitted:



Sharon McPhail

On Behalf of Kwame M. Kilpatrick, Mayor of the City of Detroit

MEMORANDUM OF RESPONDENT, KWAME M. KILPATRICK, IN SUPPORT OF HIS MOTION TO DISMISS THE PETITION OF THE DETROIT CITY COUNCIL, TO THE HONORABLE JENNIFER M. GRANHOLM, TO REMOVE MAYOR KWAME M. KILPATRICK FROM THE OFFICE OF MAYOR OF THE CITY OF DETROIT, OR IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS BEFORE THE GOVERNOR, PENDING RESOLUTION OF THE CHARGES BROUGHT BY THE WAYNE COUNTY PROSECUTOR

INTRODUCTION

Mayor Kwame M. Kilpatrick took the oath of office of Mayor in January of 2002. His tenure, like that of every Mayor that has preceded him, has been marked by tension between his office and the Detroit City Council ("Council"), the City's legislative branch of government. Mayor Kilpatrick, as CEO of the City, is represented by the City Law Department ("Law") and relies upon Law to submit memoranda to the Detroit City Council for their approval in the normal course of business. The Corporation Counsel is vested with the authority to propose settlement of cases in which the City is a Defendant.

Most often, the Mayor is not involved directly in the submission of settlement requests to the Council. Authority to resolve most matters that are brought against the City is delegated by him to the Corporation Counsel.

During the Mayor's first term in office (2002-2006), a suit was brought by former Deputy Chief Gary Brown and Officer Harold Nelthrope ("Brown"), of the Detroit Police Department alleging that they were investigating allegations of over-time abuses and unreported car accidents by officers of the Executive Protection team and that they were subjected to adverse employment actions because of their investigation. There were never any allegations pled about a "wild party" or an affair with Christine Beatty: and at trial no motion to conform the pleadings to the

evidence that had been presented during the trial. In fact, Stefani himself in opening statements said that the Brown case was not about a "party'. No allegations about "bad behavior" on the part of the Mayor were ever a part of the Brown case. The media frenzy that ensued from the mention during the trial of a "party" was without limits. Front page headlines consumed the local dailies and the story often led the news for months on every network. Though not a part of the Brown case, numerous additional items of gossip were circulated in media reports about the Mayor, including rumors of marital infidelity.

No evidence that any "party" ever happened was produced by anyone. The so-called "investigation" by Brown was never proven to have been conducted.

It is important to note preliminarily that the Deputy Chiefs of the police department are among the highest level confidants of the Mayor. Information that is known to no one else is shared with them and they are integral to the decisions made as it relates to public safety. A Deputy Chief who believes that the Mayor he serves is guilty of a crime should have reported that suspicion to an authority who might have investigated it properly; and then, as that Deputy Chief could no longer serve in a confidential capacity to a Mayor that he suspected of criminal activity, he should have requested a transfer to another position where he would have less daily contact with the Mayor: Brown did not do that.

After the Mayor's Chief of Staff, Christine Beatty, determined that Brown was not performing duties to which he had been assigned, and that he was conducting an independent investigation without the knowledge of the Chief of Police, she recommended removal of Brown from his position as a Deputy Chief. Though much has been said of the "loose" language used to describe the personnel actions taken against Brown, there was never, nor could there have been, a "firing" of Brown. By contract, Brown always had the right to revert to his last tenured position as a Lieutenant and Brown knew that. Brown opted to retire rather than be returned to his former position; and he was allowed by the Mayor to retire as a

Deputy Chief, a substantial economic benefit to him in the amount of monthly retirement payments he would receive, as well as higher sick and vacation time payments than he would be entitled to as a Lieutenant. (If , as the City Council and the Prosecutor have said, the Mayor wanted to "hurt" Brown, the Mayor could have forced Brown to retire as a Lieutenant; but did not do so.) Thereafter, Brown sued the City and others alleging violations of his employment rights in the now infamous "whistleblower" case. The trial of the case ended with a verdict for the Brown plaintiffs (including Nelthrope) in the amount of 6.5 million dollars: At the time of the verdict, with costs and attorneys fees, the City's actual liability was nearly 9 million dollars, with additional interest accruing at a thousand dollars per day. (An additional case (Harris) settled with the Brown case for only $400,000, had sought over 4 million in damages, making the City's (post-verdict but pre-settlement) exposure in this related group of cases, in excess of 13 million dollars.)

During the trial, in violation of Federal law prohibiting access to the content of conversations, Brown's attorney subpoenaed telephone records of the Mayor's administration, the so-called Sky-Tel messages. Objections were made by the defense counsel and the records were ordered <u>not</u> released to Stefani but to Judge Callahan, who placed them under court seal, <u>where they remain to this day.</u> Questions posed by Stefani during the trial reflected that he had access to the actual messages. Oddly, after both Mayor Kilpatrick and Christine Beatty had testified, Judge Callahan suggested that Stefani re-subpoena the records: Stefani did not do so until <u>after</u> the verdict and then, he did so without giving notice to the other parties (in violation of the Court Rules) (See Exhibit A, deposition of Stefani at page 139). After the settlement hearing on December 11, 2007 , Judge Callahan asked a reporter from the Free Press to visit with him in his chambers privately: Within days of that visit, reporters from the Free Press were attempting to interview citizens regarding the "text messages", which supposedly still remained under seal in Judge Callahan's court. Significantly, the text messages were never entered into evidence in the trial of the Brown case and no motions to unseal them were ever filed by Stefani, or anyone else.

As is the practice in cases of this nature, a Notice of Appeal was contemplated by the City but one was never filed: The public position of the City was that Brown was not a whistleblower and that the City would appeal. Having protected the City's right to appeal, Law and members of the Mayor's team, on many occasions, discussed settling the case and the advisability of continuing with the appeal. Settlement discussions were discussed by counsel for the City during the October 17th facilitation BEFORE Stefani brought forward his threat to reveal anything: In fact, the city attorneys were in their facilitation room discussing the global resolution of all of the cases; and one of them had called the Corporation Counsel to seek authority to offer a global settlement: None of them had any knowledge of the threat by Stefani to reveal text messages. At some point, the Facilitator came into the room and gave an envelope to Sam McCargo, one of the lawyers for the Mayor, and Sam left the room for nearly half-an-hour. During the time McCargo was out of the room, the discussion about a possible global settlement continued (again, without anyone knowing that Stefani had made the threat).

Immediately after the verdict, on September 11, 2007, several members of City Council were making statements to the media which reflected that Council wanted the case to be settled and the verdict to be paid. One Council member, Kwame Kenyatta, threatened the Corporation Counsel that no attorneys' fees would be approved for payment of lawyers representing the City in any appeal of the Brown case. Other members of the Council publicly stated that they would approve no attorneys' fees, for either the City or the Mayor, in the appeal of Brown. (See Exhibit B, a timeline referencing statements of some members of the Council) Enormous public pressure was exerted upon Council and on the Mayor's office to settle the case, and to pay the verdict. Internal discussions were held with members of Council and with Law regarding the most advisable course of action.

On October 17th of 2007, the Brown judge, Judge Michael Callahan, sent the parties to facilitation in an effort to settle the issue of attorneys' fees. Near the end

of that facilitation, Brown's attorney, Michael Stefani, produced an unfiled pleading which contained salacious text messages that Stefani said he would reveal by filing the pleading unless his settlement demand was met. Without any knowledge of that threat, he Corporation Counsel was called to the facilitation by one of the counsel for the City, who was attending the facilitation, to discuss an offer of settlement that had been made by Stefani. Thereafter, the parties adjourned to Stefani's office to attempt to draft a tentative resolution for Brown and the other related matters. There is no evidence that the case was settled to "hide" the text messages: In fact, the decision to settle Brown had been made weeks earlier.

Wading through the conflicting and contradictory allegations made by some of the Council members is challenging: However, it appears that the simple majority of five members believes that, although they insisted that the Brown case be settled, the Mayor did so to hide embarrassing information about himself that was threatened to be revealed by Stefani. This, the Council suggests, was a violation of several provisions of the City Charter. The case brought by the Wayne County Prosecutor assumes the same conclusion, that the settlement was made to hide embarrassing information, and not for the reasons that Council members themselves articulated after the verdict. The missing element in this analysis is that of "intent". There is no evidence that the Mayor intended to use public funds to hide his own conduct: Neither the Council nor the Wayne County Prosecutor have suggested that there is any evidence, save the timeline between the extortion threat of Stefani, and settlement of the case.

With regard to the perjury charges, the Wayne County Prosecutor charges that the text messages prove both that Brown was "fired" and that there was an extramarital affair between Beatty and the Mayor. It is the Council and the Prosecutor's position that Beatty and Mayor Kilpatrick lied under oath as to these matters and are therefore guilty of perjury.

For all of the reasons that follow, Council's resolutions relative to forfeiture of the Mayor's office, are void. These failed resolutions include the resolution asking the Governor to remove the Mayor. Additionally, it is most likely that Mayor Kilpatrick will not be found guilty of the charges brought by the Wayne County Prosecutor and therefore, it is respectfully suggested to the Governor that she should not base any decision she may make on the allegations or "evidence" in either matter.

The propriety of the termination of an employee is a civil matter. The personal relationship (if any) between the Mayor and Ms. Beatty is a private matter, and (without waiving any objections to the authenticity of the text messages, Respondent avers that) absent the improper release of data to which no one had any legal right, no 'evidence" of any such relationship exists. Allowing two obviously political and personal prosecutions (City Council's removal proceedings and the Wayne County Prosecutor's case) to proceed as if they were rational is a mistake that will have far reaching consequences for business and government in the future. The involvement of the Governor in the midst of these twin injustices is inappropriate. Accordingly, Mayor Kwame M. Kilpatrick respectfully requests that The Honorable Governor Jennifer M. Granholm dismiss the petition by the Detroit City Council to remove him from office or, in the alternative , that this matter be stayed pending the outcome of the charges brought by the Wayne County Prosecutor.

1.

MCL 168.327 DOES NOT REQUIRE THE REMOVAL OF MAYOR KWAME M. KILPATRICK, FROM THE OFFICE OF MAYOR OF THE CITY OF DETROIT PURSUANT TO THE REQUEST MADE BY THE DETROIT CITY COUNCIL AS

THERE IS NO EVIDENCE ON THE PART OF THE MAYOR OF OFFICIAL MISCONDUCT

The Detroit City Council, by letter and petition dated May 20, 2008, demands that the Governor of the State of Michigan remove Kwame M. Kilpatrick from the office of Mayor of the City of Detroit for violation of "the State of Michigan Constitution of 1963, Article VII Section 33, as codified by Chapter 168 of the Michigan Election Law, MCL 168.327..... for official misconduct". MCL 168.327 provides that the Governor may remove a local elected official from office where

"the officer has been guilty of official misconduct, willful neglect of duty, extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it appears by a certified copy of the judgment of a court of record of this state that a city officer, after the officer's election or appointment, has been convicted of a felony".

In support of their petition, the Council avers that the Mayor committed official misconduct in violation of the Detroit City Charter, Sec. 2-106 which indicates:

"The use of public office for private gain is prohibited. The city council shall implement this prohibition by ordinance, consistent with state law."

As of May 20, 2008, the date of the petition to the Governor, an ordinance defining the factual basis for forfeiture of an elective office and proscribing rules for implementing the terms of 2-106 had not been adopted. An ordinance is required to provide a penalty or establish a rule or regulation for violation of which a penalty is imposed. Detroit City Charter, Sec. 4-114 (1) While petitioning the Governor to remove the Mayor, the Council, pursuant to the Detroit City Charter, Sec. 2-107 (2), initiated its own parallel forfeiture proceedings: 2-107 (2) provides

"The position of an elective city officer or an appointee shall be forfeited if he or she:

A. Lacks at any time any qualifications required by law or this Charter;

B. Violates any provision of this Charter punishable by forfeiture; or

C. Is convicted of a felony while holding the office or appointment".

It is provision B. of 2-107 (2) that Council suggests Mayor Kilpatrick has violated by committing "official misconduct" as follows:

-Use of the services of the Law Department and funds to pay outside counsel and the settlement to the Plaintiffs in the Brown case without regard to the best interests of the City and in order to further the personal and private interests of the Mayor.
-Authorizing the recommendation of Law to the City Council for settlement of the Brown case "by deliberately concealing from Council material terms and conditions of those settlements, specifically the existence of the text messages and the confidentiality provisions of the settlements." This, Council avers, invalidates their approval of the settlement as said approval was obtained without "informed consent".

The Council supports its petition for removal of the Mayor with the "Special Counsel's Report dated May 5, 2008" ("SCR") a document which raises more questions than it answers. In numerous paragraphs, the SCR makes conclusions of fact without any reference to the testimony of the "witnesses" hand-selected by attorney Goodman, Special Counsel to the City Council. Specifically, at page 5 of the SCR, the statement appears at paragraph G: "There is no doubt that the reason these cases were settled so abruptly, and for these amounts, was the disclosure, by Stefani, of the text messages". No citation to the record is referenced precisely because no witness testified that the Mayor said or did anything to evidence an intent to settle the Brown matter for improper reasons.

Michigan law defines "official misconduct" in the context of removal proceedings by the Governor as "such as (affects) his performance of his duties as an officer and not such only as (affects) his character as a private individual" Krajewski v. Royal Oak 126 Mich App 695 (1983) citing Mechem, Public Offices and Officers, Sec. 457. The Krajewski decision makes a point of clearly defining the term "official misconduct" as unlawful behavior "in relation to the duties of the office, willful, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law" Carroll v. City of Grand Rapids, 265 Mich 51 (1933) and as something which in a "material way (affects) the rights and interests of the public". Clearly, the Mayor is required to authorize the settlement of cases brought against the City of Detroit and just as obvious, he is required to do so in the best interest of protecting the City treasury by limiting the amount of money paid in defense or settlement of lawsuits. The trial of the Brown case required the testimony of the Mayor and many other high-ranking city officials. If the Mayor had intended to use City money to hide embarrassing accusations, logically the time to do that was before the trial, not after it. Finally, the City Council itself, allegedly unaware of the allegations against the Mayor, insisted that the appeal should be abandoned and the judgment should be paid (See Exhibit B, timeline of statements made by Council members) : It is totally illogical to suggest that additional information of such an inflammatory nature would have resulted in Council voting NOT to dismiss the appeal and settle the case. In fact, more likely, Council would have fought harder for an immediate resolution in order to avoid the potential for increased damages to the Plaintiffs.

In order to reach the conclusion that the Mayor committed official misconduct in not revealing the existence of the text messages to the Council, it is necessary to determine first that the Mayor knew what Law revealed and/or did not reveal, with particular reference to the customary standard employed by the Law Department in recommending settlements to the Council. It is not disputed by attorney Goodman, Special Counsel to the City Council, that there is no protocol for settlement recommendations which would have required Law to reveal the existence of the

messages. In fact, attorney Goodman admits that no such requirement exists but suggests that the Brown case is so different from all others that it somehow demanded different procedures. (Exhibit C, Goodman letter to Kelly Keenan) This argument strains credulity and gives new meaning to the often quoted phrase "hindsight is 20/20".

Goodman also suggests that removal of the confidentiality terms of the draft settlement agreement was evidence that the Mayor attempted to hide information from Council. First, there is no evidence whatsoever that the Mayor ever saw the draft settlement agreement nor that he directed that terms be removed. Second, as indicated by four members of the City Council in their "Petition Opposing Removal" (Exhibit D, page 3) Council never sees or approves the actual settlement documents: Rather, Council votes solely on the prepared settlement recommendation of Law. Third, removal of the confidentiality provisions of the draft settlement agreement is as likely to have been done, among other reasons, because the references therein were not considered by the jury and thus were irrelevant to the settlement of the verdict.

Logically, since confidentiality was not a term of the settlement, the risk in removing these provisions was that Stefani was free to reveal all of the embarrassing details. It was not until December 5th, when Stefani signed the confidentiality agreement, that he was bound by its provisions: And, as we have seen, even that did not prevent him from violating its terms.

There is simply no evidence of any improper motive on the part of the Mayor in dismissing the appeal of the Brown case and agreeing to a settlement. There is no rational basis for the conclusion that the timing, between the extortion attempt by Stefani and Law's recommendation to settle the case, is proof of official misconduct. Finally, while scandal is not a desirable thing for the City or the State, the effect upon the State is not a basis to remove the Mayor absent facts to support a finding that he committed official misconduct. As was made clear by the Krajewski court,

removal is authorized only such as relates to the performance of official duties. The official duties of the Mayor of the City of Detroit have in no way suffered as a result of the charges against him. It is difficult to imagine a more productive administration than that which produced the following:

Accomplishments by the Administration of Mayor Kwame M. Kilpatrick since January, 2008

Detroit Land Bank Authority approved by City Council on Tuesday, July 29, 2008. The Authority focuses on the reduction of neighborhood blight by encouraging the revitalization and rebuilding of neighborhoods through rehabilitation, repair and development of affordable and market rate housing; and it also encourages the development of commercial, industrial, and recreational areas in the City of Detroit. It is estimated that the City of Detroit has more than 27,000 parcels of tax-reverted and vacant surplus properties in its inventory that are not being productively utilized.

City of Detroit Breaks Ground for Paradise Valley Cultural and Entertainment District at Harmonie Park on July 24, 2008. The project is the first phase of the city's effort to honor the deep cultural legacy and heritage of Paradise Valley. It is anticipated that the project will promote new business development, entrepreneurship opportunities and business start-ups. The District is expected to become one of the city's main destination locations as well as a regional and national attraction. The project is being funded by the Economic Development Corporation of Detroit's Casino Development Fund and by a number of other sources including a $600,000 grant from The Kresge Foundation.

Proposed Amendments to Chapter 9 of the Detroit Property Maintenance Code (Detroit Vacant Building Registry) will require owners to register their property within 30 days of becoming vacant, and annually thereafter, with the Buildings and Safety Engineering **Department** and obtain a certificate of registration. The amendment will help the City manage and maintain the vacant, foreclosed houses in Detroit. The Detroit Free Press in its February 13, 2007 issue reported that Detroit had the highest foreclosure rate among the nation's 100 largest metro areas for 2007. It is estimated that there are currently 11,000 vacant properties due to foreclosure. The annual fee for registration is $50.00.

Detroit Office of Foreclosure Intervention and Response opened ... effectively link public and private sector activities and resources dedicated to Detroit's foreclosure challenge, facilitate strategic planning sessions with key stakeholders to develop a comprehensive foreclosure intervention response and identify or develop an effective foreclosure data collection mechanism to track neighborhoods or areas of high foreclosure activity and monitor the effectiveness of the foreclosure intervention response.

Dequindre Cut recreation 1.3 mile trail slated to open in August. The trail sits on a former railroad bed below street level and runs along the eastern edge of downtown Detroit, several blocks east of the Chrysler Freeway. Above the trail, the Mies van der Rohe towers of Lafayette Park and the 19th century steeple of St. Joseph Church. The path starts at Gratiot on the north, just north of Eastern market, and terminates about a block north of Atwater Street. Plans call for the trail to eventually lead to Tri-Centennial State Park on the waterfront and extend gradually north toward the New Center area (West Grand Boulevard and Woodward Avenue).

Detroit Department of Transportation Receives Approval of Woodward Avenue Light Rail by The Southeast Michigan Council of Government (SEMCOG) General Assembly, which includes members from six other counties. The light rail service will be operated on Woodward Avenue between downtown and Eight Mile Road. The first phase was concluded in April, 2008. Construction could begin as soon as 2010.

Detroit Department of Transportation offers Express Service to provide a convenient, environmentally friendly, and cost effective way to travel during peak hours. There are five Express Service Routes. The routes support the 33 percent of daily rider-ship thus reducing travel time by 40 to 50 percent.

Adopt -A-Shelter/Motor City Makeover sponsored by the Detroit Department of Transportation to improve cleanliness and safety within Detroit neighborhoods by removing litter at and around sheltered DDOT transit bus stops. Volunteers adopt one or more bus shelters within their community or designated school district. There are approximately 200 bus shelters in the Metro Detroit area.

Detroit Police Department's new Central District station **Grand Opening** on Wednesday, May 14. Officers officially began working at the new station at 7310 Woodward Avenue in late April. The eight-story building, known

as the Labor Building offers in addition to the extra space, the building provides the approximately 216 officers with a work-out area and cafeteria. The Central District, which was formed after the department was restructured in 2004, encompasses the old First and 13th precincts. The station is also the permanent home for the 214 memorial plaques honoring officers killed in the line of duty.

Next Detroit Neighborhood Initiative Office **opened on May 8, 2008.** The office is located in the North End at 7310 Woodward Avenue on the fourth floor. NDNI is a strategy Mayor Kilpatrick launched in 2007 that organizes city services around specific neighborhood work plans. The goal was to raise $2 million in its first year, but due to overwhelming support from the philanthropic community and partnerships with financial institutions, NDNI raised $8 million for the initial phase of the initiative. Over 4,000 residents participated in home repair and weatherization fairs where they learned how to apply for grants for home repairs. NDNI also issued more than 8,000 tickets for blight, commercial business code violations or non compliant rental properties; the planting of 850 new trees and the removal of 750 dead trees, and more than 1,700 tons of illegal dumping was picked up.

Nearly $2.5 million in new fire apparatus was unveiled **on April 4, 2008.** More than $30 million has been invested in new fire equipment and vehicles since Mayor Kilpatrick took office in 2002.

Expansion of Detroit Workforce Development Hospitality/Retail Career Center Program with $1.85 million grant from the U.S. Department of Labor Employment & Training Administration for the new program. Under the program an apprenticeship was established with CVS/Caremark (CVS Pharmacy Internal Training and Certification process). The participants will receive apprenticeship credentials from the U.S. Department of Labor upon completion; and Wayne County Community College District will award college credits to program participants and develop community college courses and certification based on apprenticeship program.

Detroit Downtown Development Authority approved a development agreement in January with New York-based Northern Group Inc. to ready in 18 months to build a $150 million entertainment, retail and apartment complex called Monroe Block near Campus Martius.

2.

THE AFFIDAVIT OF COUNCIL PRESIDENT KENNETH COCKREL IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE DETROIT CITY COUNCIL'S PETITION FOR REMOVAL OF THE MAYOR OF THE CITY OF DETROIT

-

MCL 168.327 provides that:

"The governor shall not take action upon any charges made to the governor against a city officer until the charges have been exhibited to the governor in writing, verified by the affidavit of the party making them, that he or she believes the charges to be true".

Exhibit E, the affidavit of Council President Kenneth Cockrel, is a document of only four sentences which states that he has read the document entitled "In Re Charges of the Detroit City Council Against Honorable Kwame M. Kilpatrick Seeking His Removal for Acts of Official Misconduct" filed by the five members of the Council who voted for it.

The Governor, sitting in a judicial capacity in this matter, has not been given specific rules by the legislature as to the content of the affidavit that is to be submitted pursuant to MCL 168.327: However, the legislature has provided for the filing of affidavits in support of motions in civil matters at MCR 2.119 . Verified pleadings do not contain statements sufficient to satisfy the criteria applicable to affidavits filed in support of a motion. See Miller v. Rondeau, 174 Mich App 483 (1988). In Miller, the court indicated that a pleading may be verified merely by declaring that the statements in the pleading are true and accurate to the best of the signer's knowledge and belief: However, where an affidavit is required to be filed in support of a motion, it must be made on personal knowledge, stating with

particularity facts that are admissible as evidence, establishing the grounds stated in the motion and showing affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

The affidavit of President Cockrel gives no indication as to which facts he might testify if called and, in fact, fails to aver that he is competent to testify as to any facts. The affidavit refers to the Special Counsel's Report, which itself is wholly conclusory. The affidavit, in that it is legally insufficient, provides no basis for any findings by the Governor as to the facts alleged in the Petition. Respondent respectfully requests that the affidavit be stricken from the pleading of the City Council.

3.

THE PENDING REQUEST FOR REMOVAL WAS MADE IN VIOLATION OF THE COUNCIL'S OWN RULES, BY ONLY A SIMPLE MAJORITY OF THE DETROIT CITY COUNCIL : THUS, IT MUST BE DISMISSED WITHOUT FURTHER PROCEEDINGS

The petition for removal of the Mayor from office that is pending before the Governor was submitted by five members of the Detroit City Council, not as individuals, but as the Council body. In that the body of the Council in a matter of this nature may adopt a resolution only upon a vote of two-thirds of the Council (six votes) the petition is void.

The Detroit City Charter provides, at Sec. 4-105, as follows:

"The City Council shall determine its own rules and order of business and shall provide for keeping a journal of its proceedings ....."

Pursuant to this provision, the Council adopted Council Rules (Exhibit F) which provided in pertinent part at Rule 10.4

"The most recent edition of Roberts Rules of Order will govern the procedures of the Council in all situations not otherwise provided for by statute, charter, ordinance or the adopted rules of this body."

There is no rule governing the voting majority required for the forfeiture of any office. Some guidance as to the seriousness with which Council takes forfeiture proceedings is given with regard to forfeiture of a Council committee chair, which requires a two-thirds vote. Pursuant to Rule 10.4 of the City Council rules, Exhibit G, Rule 44 of the latest edition of Robert's Rules of Order , Newly Revised, 10th ed., page 388, 1.20(e) provides that

"...a two thirds vote is required to adopt any motion that ....(e) takes away membership or office".

It cannot be seriously argued that a petition by resolution to forfeit the office of the Mayor is required to have less than a two-thirds vote to be adopted. This resolution, if accepted by the Governor, is intended to do just that-----take away the office of Mayor. Moving a council member from a committee chair, clearly a less significant act than forfeiture of an elective office, requires a two-thirds vote. Resolutions leading to removal of an elected official can not be done with only a simple majority of the Council.

4.

THE GOVERNOR'S REMOVAL PROCEEDINGS, IN THAT THEY ARE BASED UPON THE IDENTICAL FACTS ALLEGED IN THE CHARGES PROFERRED BY THE WAYNE COUNTY PROSECUTOR, WILL REQUIRE THE MAYOR TO SUBMIT EVIDENCE WHICH WILL UNDERMINE HIS DEFENSE AND WHICH MAY ALSO SUBJECT HIM TO WAIVER OF HIS RIGHT AGAINST SELF- INCRIMINATION: FOR THIS REASON AND OTHERS, THE

GOVERNOR SHOULD DISMISS THE PENDING PETITION OR STAY IT UNTIL THE OUTCOME OF THE CRIMINAL CHARGES

Any governmental pressure that makes the assertion of the Fifth Amendment right against self-incrimination too costly is constitutionally impermissible compulsion. Griffin v. California, 380 US 609 (1965) The creation of an impermissible choice between the assertion of the privilege and other rights or important interests has also been condemned. The unique circumstances presented in the matter pending before the Governor provide a watershed moment in the rights of an accused against self-incrimination. In the matter of the removal of the Mayor of the City of Detroit, there are three separate "trials" of the same facts taking place at the same time. Each of the proceedings carried the identical penalty of removal from office: The criminal case, of course, carries additional penalties. All of the proceedings are being conducted by governmental entities: The Wayne County Prosecutor; The Detroit City Council and now, The Governor of the State of Michigan. Both the City Council hearings and the Governor's process (which may lead to a hearing) began after the initiation of charges by the Prosecutor. It could be argued that all three governmental entities have come together in a combined effort to force the defense to provide incriminating evidence against the Mayor.

In the criminal case, a conviction on the perjury and mis-use of public funds charges require the identical proofs required by the Detroit City Council and the Governor to establish "official misconduct". To the extent these proceedings require proofs on the ultimate issues in the criminal case, they deprive the Mayor of his Fifth Amendment right against self-incrimination and shift the burden of proof to the defense to establish that his intent was not to mis-use public funds. The Supreme Court has acknowledged and reinforced the notion that proof beyond a reasonable doubt is an element of due process. In Re Winship, 397 U.S 358 (1970) This application of this rule was illustrated in the case of Mullaney v. Wilbur, 421 U.S. 684 (1975) where the Court held that the government's burden of proof cannot be

satisfied by proving some of the elements and then presuming that other elements have been established unless disproved by the defendant.

The sine-qua-non of the proofs required for a conviction of the felony charges against Mayor Kwame Kilpatrick is proof of the element of *intent.* To date, after investigations conducted by both the Wayne County Prosecutor and the Detroit City Council's Special Counsel, William Goodman, no direct evidence of intent has been found. In fact, the only "evidence" from which an inference has been drawn by both investigations is that of the timeline between the extortion threat by Brown's attorney, Stefani, and the settlement of the Brown case. The question remains then whether a timeline, without more, is sufficient proof of an essential element of the offense charged to sustain a conviction? To date, no inquiry from either the Prosecutor or the Detroit City Council has focused on determining whether, prior to October 17th, any decision had been made by the Mayor to resolve the Brown case. Both the Prosecutor and the Council have accepted the newspaper accounts of the decision to appeal as evidence that there was no intention to resolve the Brown case: Nothing could be more ridiculous.

That attorneys routinely file notices of appeal in order to obtain an advantage in settlement negotiations is a fact of which any court might take judicial notice. So common is it to file and later dismiss an appeal that any effort to establish that fact from the timeline between Stefani's extortion threat and the resolution of the case would be insufficient to meet the government's burden of proof on the criminal charges. Moreover, any effort to establish an essential element of the crime's charged by the Prosecutor through another governmental entity could well lead to the application of principles of double jeopardy. Where a proceeding is so punitive and the proofs identical to those required to establish the crime charged, the characterization of the proceeding as "administrative" will not allow it to escape characterization as punishment for the purpose of Double Jeopardy analysis. For these reasons, Mayor Kwame Kilpatrick respectfully requests that the Governor

dismiss the petition of the Detroit City Council or, in the alternative, stay these proceedings pending the outcome of the criminal charges.

5.

THE DETROIT CITY CHARTER DOES NOT PROVIDE FOR REMOVAL OF AN ELECTED OFFICIAL FOR THE REASONS UPON WHICH THE CITY COUNCIL BASES ITS REQUEST FOR REMOVAL

Fundamentally, the Detroit City Council is asking the Governor to remove the Mayor for violations of the Detroit City Charter. In fact, the Charter does not allow forfeiture of an elective office for "official misconduct". The forfeiture provisions are at Section 2-107 of the Charter and they provide:

"....The position of an elective city officer or an appointee shall be forfeited if he or she:

- ***A. Lacks at any time any qualifications required by law or this Charter,***
- ***B. Violates any provision of this Charter punishable by forfeiture; or***
- ***C. Is convicted of a felony while holding the office or appointment. "***

The City Council, by Charter, is the "judge" of the grounds of forfeiture of an elective officer..... In Detroit v. Walker, 445 Mich. 682 (1994) the Michigan Supreme Court directed the use of official commentary in the interpretation of the provisions of the Charter. As to Section 2-107, the forfeiture provision, the Charter Review Commission provided:

"Section 2-107 is a revision of several sections of the present charter which make numerous references to various procedures based on different factual grounds for ousting an officer or employee from his position. The purpose of this section is to present all those various procedures in one place." And, as to forfeiture, the Commission said that "Finally, sub-section 2-107 (2) introduces the term forfeiture.

The Council is the judge of whether an elective officer or appointee has incurred forfeiture upon any grounds stated in this sub-section".

The commentary makes it clear that, when determining whether an elective office should be forfeited, the Council is limited to the" grounds stated in this sub-section" A review of the Charter demonstrates that there are no grounds for forfeiture specified other than those referred to in 2-107 (2), as to qualifications and conviction of a felony. As has been argued in of this memorandum, Council had every opportunity to make "official misconduct" a ground for forfeiture by adopting an ordinance under Section 4-114. Failure to do so limits the Council to the qualifications and felony provisions of the forfeiture section of the Charter.

6.

THE RULES AND REGULATIONS ESTABLISHING CONDUCT, THE VIOLATION OF WHICH WOULD SUBJECT AN ELECTED OFFICIAL TO REMOVAL WERE REQUIRED TO BE PROMULGATED IN ADVANCE OF THE CONDUCT, BY ORDINANCE: APPLICATION OF SAID RULES EX-POST-FACTO TO THE CONDUCT WOULD VIOLATE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS.

The United States Constitution, by Article I, Sec. 10, forbids the states to adopt any "ex-post-facto law". The Michigan State Constitution contains a similar provision. "An ex-post-facto law is defined as one passed after the occurrence of a fact or commission of an act which retrospectively changes the legal consequences or relations of such fact or deed" Black's Law Dictionary, 5th edition. It is not disputed that City Council was required to establish an ordinance defining the basis for forfeiture of an elected official pursuant to 2-107 (2) B. In fact, recently, Council did adopt an ordinance which, though insufficient to meet the due process standards that apply to it, purports to create "procedures" to forfeit the office of the Mayor.

(Exhibit H) In these recently promulgated rules, Council purports to establish a process to forfeit the elective officer of the Mayor customized to the conduct that allegedly occurred prior to promulgation of the rules. In one particularly absurd provision, the Council rules require only a simple majority vote to remove the Mayor. (Exhibit H) The number of provisions of these rules that are subject to a finding of unconstitutionality is staggering: As that analysis is not necessary to this Motion, it will suffice to say that the failure to adopt standards which define the conduct necessary to subject one to forfeiture is fatal to the continuation of the forfeiture process by the Detroit City Council.

Moreover, where an investigatory body has the power not merely to investigate and recommend, but also to make specific findings of guilt, the Supreme Court has ruled that "due process requires such a body to afford a person being investigated the right to confront and cross examine adverse witnesses; and that the right to present oral testimony and to compel attendance of witnesses may not be made dependent upon the unfettered discretion of the investigatory body." Jenkins v McKeithen, 395 U.S. 411 (1969). As to this matter, with regard to the investigation by the City Council, they did not do so...and it appears from the new "rules" that they have no intention to do so in the future.

7.

THE DETROIT CITY COUNCIL INVESTIGATION OF THE UNDERLYING FACTS THAT FORM THE BASIS OF THEIR REQUEST TO THE GOVERNOR TO REMOVE THE MAYOR FROM OFFICE WAS FLAWED AND MAY NOT BE USED AS "EVIDENCE" IN THE REMOVAL PROCEEDINGS OF THE GOVERNOR. SPECIAL COUNSEL TO THE CITY COUNCIL AND SEVERAL OF THE COUNCIL MEMBERS PRE-DETERMINED THE RESULTS OF HIS INVESTIGATIVE HEARINGS BEFORE HOLDING THEM, THUS TAINTING THE PROCESS AND MAKING IT INHERENTLY UNRELIABLE.

Due process of law demands that persons accused of acts which subject them to criminal penalties must be tried only before impartial panels. It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process. Specifically, a judge who has a personal or financial stake in the outcome of a proceeding should not be allowed to sit in judgment. The investigative phase of the City Council process was a fact finding process which has been forwarded to the Governor with a request for removal of the Mayor from office. A formal resolution adopting the "findings of fact in special counsel's report of May 5, 2008" is attached hereto as Exhibit I.

Pursuant to the City Charter, Section 5-109, the President of the City Council succeeds to the office of Mayor in the event of a vacancy in that office. As a personally interested party, President Kenneth Cockrel should not have taken part in the investigative hearings of Council nor should he have voted as to the "findings of fact": But this violation of the fundamental due process due to any elected official in these circumstances pales in comparison to the statements made by the other members of the Council.

On March 13, 2008, Member Kwame Kenyatta proposed and the Council adopted a resolution calling for the resignation of the Mayor for the reasons that ultimately appear as findings of fact in the investigation conducted by Council. (Exhibit J) During this time, Council and its Special Counsel, Goodman, worked hand-in-hand with the Wayne County Prosecutor in investigating the Mayor. (Exhibit K, article from the Detroit News dated March 14, 2008) Attorney Goodman admitted to meetings with the Prosecutor's office and ex-parte discussions with judges assigned to the myriad cases that were filed against the City. It is not disputed that Goodman called Judge Giovan directly to ask if the Court would look favorable on the filing of an amicus brief in the matter of disqualification of the entire 36th District Court bench, as requested by the Prosecutor. The headlines of March 19th, "Council to Mayor: Resign", tell the story of the prejudiced view with which Council approached the matter of the investigation of the Mayor's conduct. (Exhibit L, article of the Detroit News dated March 19, 2008)

With the televising of the City Council meetings, the public was treated to a daily diet of accusations and conclusions as to the presumed "guilt" of the Mayor. If there were any doubt as to the "piling on" phenomena led by the daily newspapers in the City of Detroit, one need only read articles published in advance of the Council hearings, Exhibits M and N attached hereto, which are captioned "A Quiet Warrior for Detroit: Many say Ken Cockrel Jr. is up to the job of leading the city" dated April 7th ; and the Free Press editorial , entitled "Check all of mayor's attorney bills" dated April 29th. The Free Press editorial promised that council member Sheila Cockrel would propose requiring advance approval of all legal contracts. It was after this publication that Council approved hundreds-of-thousands of dollars in payment to its own attorney, Goodman, while denying the Mayor approval of payment for attorneys to respond to the actions they were taking against him.

It cannot be suggested seriously that this process was a fair or impartial one: However, even assuming arguendo, that the kangaroo court atmosphere of the City Council proceedings was permissible, the cross-fertilization of the views of Council with calls to the Prosecutor (See page two of the article of March 14th at Exhibit K) reflect that press and the Council have been the agent of the Prosecutor in creating an atmosphere designed to taint the jury pool and deny the Mayor a fair and impartial trial.

8.

THE STORED COMMUNICATIONS ACT, 18 USCA Sec. 2701 et seq, PROHIBITS THE DISCLOSURE OF THE CONTENTS OF THE "TEXT MESSAGES": ABSENT THE ILLEGALLY OBTAINED CONTENT, THE INTRODUCTION OF WHICH SHOULD BE BARRED AT TRIAL, INSUFFICIENT PROOF EXISTS TO MEET THE PROSECUTORS BURDEN OF

PROOF BEYOND A REASONABLE DOUBT AS IS REQUIRED FOR A FINDING OF GUILT

The Stored Communications Act ("SCA"), the attorney/client privilege, the deliberative process privilege and the confidential communications privilege as well as a failure of authentication of the so-called Sky-Tel text messages will result in the suppression of the contents of the messages: For the purpose of this Motion, the Stored Communications Act is the focus because it conclusively establishes that the Mayor has a reasonable expectation of privacy in the content of any text messages sent by him or to him. This is important to the Governor's process because it is the single piece of "evidence" upon which the Prosecutor bases her charges. Without authentication and introduction of the text messages, the Prosecutor will have no evidence to present to the jury. It is important to note here that, although numerous federal and state court judges have been presented with motions to release these messages, no court has done so nor has any court ruled that the messages are admissible in evidence.

The SCA protects the content of messages stored by Sky-Tel and other telephone text messaging devices as individual users have a reasonable expectation of privacy in the contents of their communications. United States v. Finley, 477 F. 3d 250 (5th Cir. 2007). Recently, the Ninth Circuit affirmed this privacy interest in Quon v Arch Wireless Operating Co. Inc., Case No. 07-55282 (9th Cir. 2008) attached hereto as Exhibit O. The Court held that:

"Here, we must first answer the threshold question: Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network? We hold that they do." Quon, at 7018.

Although it is possible for a prosecutor to obtain text messages through lawful means by way of search warrant, in this case, none of the requirements for legal access to the messages were followed. Moreover, in that the messages were obtained through use of an illegal civil subpoena in the Brown case, and then provided to the local press and the prosecutor by either the judge in the Brown case or the attorney for Brown, the messages will not be admissible in the Prosecutor's case.

Pending before the 36th District Court, Judge Ronald Giles, is a Motion to Suppress electronic communications (Exhibit P, attached hereto) which is incorporated herein by reference, and contains all of the arguments necessary to suppress the content of the messages.

9.

THE MICHIGAN PERJURY STATUTE, MCL 750.423, IS VOID FOR VAGUENESS IN THAT THE STATUTE GIVES NO NOTICE THAT AN IMMATERIAL OR IRRELEVENT MISSTATEMENT OF FACT CONSTITUTES A VIOLATION OF THE PERJURY STATUTE, A FELONY

The Supreme Court has held that any criminal statute must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct. Moreover, a penal statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement . Kolender v. Lawson, 461 U.S. 352 (1983)

In the State of Michigan, from 1846 until 1931, when the current perjury statute was enacted, the definition of perjury was identical to the statutory definition:

"If any person authorized by any statute of this state to take an oath, or if any person of whom an oath shall be required by law shall willfully swear falsely, in regard to any

matter or thing, respecting which such oath is authorized or required, such person shall be deemed guilty of perjury…."

From 1846 until the Michigan Supreme Court's decision in People v. Lively, 470 Mich. 248 (2004), the courts of this state have uniformly held that materiality is an essential element of statutory perjury. Reversing decades of state jurisprudence, the Michigan Supreme Court in 2004 announced that the definition of perjury, in the very same statute that once required materiality, no longer requires materiality. The decision seems gratuitous in that it comes in a case in which there was no question as to the materiality of the false statement of the defendant. The majority opinion was authored by Justice Maura Corrigan who, while on the Michigan Court of Appeals, held that materiality is an element that must be submitted to the jury. (See 254 Mich. App 249 (2002))

The Court, considering the language of the statute which is identical to the common law definition found that the legislature must have intended that materiality not be required or it would have specifically indicated otherwise. Upon these shaky grounds, the Court reinstated the conviction of a woman for lying about whether she had notice of a divorce proceeding, thus subjecting her to a 15 year prison term. Thus, a reasonable person is expected to understand that suddenly, after 150 years of Michigan jurisprudence, misrepresentations of no particular importance in the matter in which testimony is being given, constitute felony perjury.

The primary reason that is offered to explain the vagueness doctrine is that persons deserve fair warning of laws which they must follow. The difficulty of achieving perfect clarity of definition has been repeatedly acknowledged by the Supreme Court which concedes that "even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid". Rose v. Locke, 423 U.S. 48 (1975) Although the majority opinion made light of it, the potential for arbitrary or discriminatory enforcement by prosecutors is a very real threat to our personal freedoms:

Nowhere is that point more devastatingly made than in this case. The Wayne County Prosecutor charged the Mayor of the City of Detroit with perjury as to essentially two matters: An alleged affair with his Chief of Staff and a decision to "fire" a Deputy Chief. The now infamous case, that of former Deputy Chief Gary Brown, did not in any way concern an affair between the Mayor and his Chief of Staff. In fact, the allegations made by Brown involved a never-proven party that he claimed he was investigating and several vignettes of alleged trysts with various women. There is no basis to conclude that the decision to deny the affair, whether said affair actually existed or not, was in any way material to the case. Moreover, there would be no way for any reasonable person to know that misrepresenting a fact that is not important in the case would subject one to felony perjury charges. If lying about an affair is now a 15 year felony, absent discriminatory charging, our courts soon will be clogged with criminal prosecutions for perjury.

Much has been made of the language used to describe the demotion of Gary Brown, a Deputy Chief whose necessarily close confidential relationship with the Mayor, he somehow thought, permitted him to investigate the Mayor instead of doing the work he was assigned to do. Simply put, the word "fire" is an inartful term used to describe the personnel action taken to return Brown to his former position, one which did not require the same level of confidentiality as that of a Deputy Chief.

The statutory language in the perjury statute is also potentially confusing in that it refers to "any matter or thing respecting which such oath is authorized or required": A reasonable person might reasonably believe that those matters not of any significance in the matter before the court, are not included as "any matter or thing....". Due process considerations bar courts from applying a novel construction to a criminal statute to conduct that neither the statute nor any prior judicial decision fairly disclosed to be within its scope. U.S. v. Lanier, 520 U.S. 259 (1997)

CONCLUSION

The Governor's power to remove an elected official is granted to her because of her superior judgment and the trust that is vested in her by the people of the State in electing her to the State' s highest office. There is no question that the moral and political challenges posed by the current Petition of the Detroit City Council create an extremely difficult situation for the Governor. It is, as Rev. Dr. Martin Luther King Jr. once said, not a "time of comfort and convenience" but one of great controversy. The Governor's decision in this matter will have far-reaching consequences not only for her, but for any successor to the Office that she holds. Another governor, in another state, many years ago, dealt with an identical situation: Governor John A. Dix, of New York, was asked to remove New York City Mayor William Havermeyer essentially for reappointing individuals who had been convicted of violations of their oath of office and for official misconduct in refusing to investigate their official conduct. (Exhibit R) Unlike the matter pending before Governor Granholm, in the New York case, the facts were not disputed. Notwithstanding the Governor's conclusion that the "good name of the city has been tarnished and the dignity of the office of it's chief magistrate compromised", the Governor of New York found that the authority delegated to him to remove the Mayor in his view was intended to apply strictly to those situations in which "no law had been infringed and for which no legal redress had been provided" He said further that "It is a high prerogative to be exercised ONLY in the interest of the public and NOT to punish official misconduct". (Emphasis supplied)

The challenges presented in proceeding to review the factual allegations averred by the Detroit City Council are numerous: Most importantly, there has been no factual development of the record in that the only proceedings that have been conducted were "investigative" in nature. Thus, the Governor would be making findings of fact and legal conclusions in the first instance, and in advance of the trial on the Prosecutor's charges. In deciding not to remove the Mayor of New York, Governor Dix said :

"I deem it proper to decline any further proceeding in the case. In a few weeks, the question of the nomination, and in less than two months, the question of the election of a successor to the Mayor will be presented to the people of the City. In the decision of these questions they will, either directly or indirectly pass judgment on his official acts, and o them the whole subject may be safely left, with the assurance that the verdict will be such as the occasion demands and in consonance with an unprejudiced sense of right toward him and toward themselves."

Taking from the people of any local government the right to select their elected official is a serious matter. Where the issues are being addressed both by the local legislative branch and by the Prosecutor, the involvement of the Governor is not only duplicative but unnecessary. A decision to deny the City Council at this petition does not bind the Governor to deny any future requests that they, or anyone else, might make of her. There is indeed a time and a place for everything: Respectfully, this is neither the time nor the place for the Honorable Governor to remove the Mayor of the City of Detroit from his office. For all of the reasons that follow, Mayor Kwame M. Kilpatrick respectfully requests that she deny the Petition of the Detroit City Council or, in the alternative, that she stay the within proceedings pending the outcome of the matter initiated by the Wayne County Prosecutor.

Respectfully Submitted,

By Sharon McPhail

Sharon McPhail
Counsel to the Honorable Kwame M. Kilpatrick

August 6, 2008